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Supreme Court of the United States

OCTOBER TERM 1945

No.

SANTO GRASSO,

Petitioner,

—against—

OIVIND LORENTZEN, Director of Shipping and Curator for the ROYAL NORWEGIAN GOVERNMENT, operating as a NORWEGIAN SHIPPING & TRADE MISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner respectfully prays for a writ of certiorari to review the decision of the United States Circuit Court of Appeals for the Second Circuit in the above case.

Summary Statement of the Matter Involved

This petition seeks to review a judgment affirming a judgment of the District Court for the Southern District of New York, entered on a decree in an Admiralty action for personal injuries suffered by the petitioner on the 15th day of May, 1942 in the course of his employment as a longshoreman aboard the respondent's Steamship "Torvanger".

The action was, in Admiralty, based on a maritime tort.

The Trial Court as well as the Circuit Court of Appeals, erroneously treated the action as a civil cause, based on negligence.

The answer denied generally and pleaded affirmative defenses; contributory negligence, assumption of risk and acceptance of some compensation payments under an award in compensation under the Longshoremen and Harbor Workers' Compensation Act (ff. 14 to 30).

The Facts*

The petitioner Grasso was a stevedore in the employ of the Northern Dock Company (f. 397), contracting stevedores engaged in loading cargo on the S.S. TORVANGER (ff. 94-95), which was docked at the New York State Pier at the foot of Columbia Street, South Brooklyn, N. Y. (f. 95). On May 15, 1942 about 10:45 in the forenoon (ff. 235, 579), Grasso was working in No. 2 hold with several other stevedores (ff. 183-184), shifting crates of cargo (ff. 183-184). To move the crates into position a cable leading from a winch on the upper deck, operated by the stevedores, was used (ff. 98, 99, 580). This cable passed through a snatch block which was located near the corner of the hold, so that when power was applied to the cable it pulled the crate into the position desired (ff. 99, 101, 581). The snatch block was fastened to a "strap" which passed around one of the ship's upright iron beams (ff. 581, 191, 238, 279, 281). The strap consisted of a wire rope an inch in diameter, six feet long, with a loop at each end into which a hook on the snatch block was hooked (ff. 106, 107). The strap was passed around the top of an upright beam (ff. 106, 107).

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* Although there was no factual issue that the Second Circuit Court of Appeals was asked to pass upon nor that this Court is asked to consider, it might be in place to call this Court's attention to the fact that the Circuit Court of Appeals inadvertently made several material mis-statements of fact in its opinion which will be pointed out hereafter.

In the process of moving one of the crates the strap broke, causing the snatch block to fall striking Grasso and injuring him (ff. 279, 581). Shortly after this happened, the strap was examined and it was found that the strap had broken near the middle; that for about a distance of some six inches each way (ff. 188, 581) from the break the strands were rusted all the way through and that this portion was brittle and weak (ff. 189, 581).

Captain Cross, called by the petitioner, the only expert in the case, testified that such a cable in good condition had a breaking strain of 18 to 20 tons (f. 152); that if in good condition, a cable strap would not wear out in one loading operation such as loading the S.S. "Torvanger" (f. 159); that it would have to be in an abnormal condition to wear out (f. 159) and that it would not break in normal use if in good condition, while moving cases weighing up to seven tons (f. 159); that if the cable was rusted completely through the middle, it would probably break under the strain of seven tons (f. 173).

Petitioner called five eye witnesses to substantiate his contentions. Respondent called no witnesses but did read into evidence portions of a statement which denied that the chief officer personally provided the cable in question (f. 466). There was no other proof offered on behalf of respondent as to any fact in the case or who provided the cable.

The Trial Court resolved the only issue of fact in the case in favor of the petitioner stating as follows:

> **"Although respondent contends to the contrary the evidence is convincing that this strap was the ship's property and that the stevedores found it hanging on a beam in the hold when they began this work"** (ff. 581, 582).

The Trial Court was fully convinced that the petitioner had sustained his burden of proof, for at the close of the trial, the Court stated:

> **"The Court: I do not think you need too extended a discussion in your brief on the question of the strap, because I think from my recollection of the testimony that I would find in favor of the libellant on that"** (f. 562).

The Court, at that time was satisfied that the accident was caused as the result of a defective and unseaworthy strap, that an issue of fact had been established and therefore the libelant was entitled to recover (f. 562).

Thereafter the Court changed its mind and decided the case on the following erroneous interpretation of the law:

> "It does not seem to me that under the circumstances the ship should be held responsible for the result. The stevedores chose to use it instead of one of their own. In doing so they assumed the risk. It was their duty, not the ship's, to see that it was fit for their purposes" (ff. 598, 599).

The Circuit Court of Appeals did not agree with the Trial Court's statement of the law, nevertheless failed to reverse.

It seems that the Circuit Court of Appeals inadvertently overlooked the question before it treating the case as involving an issue of fact as to the respondent's negligence, when the only question before the Court was one of law.

The Circuit Court of Appeals erroneously found that the action had been instituted by a "plaintiff" predicated on a civil tort of negligence when such was not the case.

The action was in Admiralty predicated upon the vessel's unseaworthiness. The libelant sustained his burden of proof when he showed by credible and uncontradicted evidence that the cable which was owned and rigged by the vessel broke solely because of its rusty and defective condition and through no other cause, resulting in the accident complained of.

It was the respondent who failed to sustain its burden of proof by showing that the vessel was seaworthy. Respondent offered no proof whatsoever on this question.

The libelant was entitled as a matter of right to all of the benefits of Admiralty law in accordance with the uniform decisions of this Court so frequently stated since the early case of *The Frank and Willie*, 45 Fed. Rep. 494 up to the recent case of *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, and as stated by the Second Circuit Court of Appeals in the case of *H. A. Scandrett*, 87 Fed. (2d) 708.

The Questions of Law

1. In affirming the judgment of the District Court, the Circuit Court of Appeals decided that the benefits of Admiralty law are to be denied to stevedores in an Admiralty action predicated on a maritime tort, contrary to the holdings in the cases of:

International Stevedoring Company v. *Haverty*, 272 U. S. 50 (1926);
Atlantic Transport Company of West Virginia v. *Imbrovek*, 234 U. S. 52 (1914);
Garrett v. *Moore McCormack Co.*, 317 U. S. 239.

2. The decision squarely reverses the uniform prior holdings of this Court that a vessel is liable for an accident due

IN THE

Supreme Court of the United States

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No. 340

SANTO GRASSO,

Petitioner,

—against—

OIVIND LORENTZEN, Director of Shipping and Curator for the ROYAL NORWEGIAN GOVERNMENT, operating as a NORWEGIAN SHIPPING & TRADE MISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

JACOB RASSNER,
Counsel for Petitioner.

GEORGE J. ENGELMAN,
Of Counsel.

to the breaking of defective gear, owned and rigged by the vessel. This is contrary to the holding in the cases of:

Curtis Bay Towing Co. v. *Dean*, 1938, 199 A. 521, 174 Md. 498, Cert. Den. 1939, 59 S. Ct. 92, 305 U. S. 628;
Beadle v. *Spencer*, 298 U. S. 124;
The Arizona v. *Anelick*, 298 U. S. 110.

3. This decision also squarely reverses the uniform holdings of this Court since the case of *The Frank and Willie*, 45 Fed. Rep. 494, up to the recent case of *Garrett* v. *Moore McCormack Co.*, 317 U. S. 239, that a stevedore may maintain an action in Admiralty against a ship owner, predicated on the unseaworthiness of the vessel and need not prove negligence.

4. This decision creates new law with regard to the burden of proof, holding that in an action predicated upon the breakage of ship's gear, the seaman has the burden of proving unseaworthiness of the vessel, instead of the shipowner proving seaworthiness, as has been the law heretofore, as reiterated recently in the cases of *Garrett* v. *Moore McCormack Co.*, *supra*, and *H. A. Scandrett*, 87 Fed. (2d) 708.

5. This decision absolves the shipowner from liability where heretofore the shipowner was held liable, and places the responsibility on a stevedore for injuries due to defective ship's gear, although the defects are not observable in the exercise of ordinary care. This is contrary to the holding in the case of *Liverani* v. *Clark & Son*, 231 N. Y. 178, cited with approval in the case of *Port of New York Stevedoring Corporation* v. *Castagna*, 280 Fed. 618, certiorari denied 258 U. S. 631, and the holding in the case of *Faunterloy* v. *Argonaut S. S. Line*, 27 Fed. (2d) 50.

6. This decision creates an absolute legal defense of assumption of risk, where defects not observable in the exercise of ordinary care, cause an accident, which is contrary to the holdings in the *Liverani* v. *Clark & Son* case *supra*, *Port of New York Stevedoring Corporation* v. *Castagna* case *supra*, and the *Faunterloy* v. *Argonaut S. S. Line* case *supra*.

7. This decision is a complete departure from the well recognized law that contributory negligence of one joint tort feasor does not absolve another. This is contrary to the holding in the cases of:

Liverani v. *Clark & Son*, 231 N. Y. 178;
Port of New York Stevedoring Corporation v. *Castagna*, 280 Fed. 618, cert. den. 258 U. S. 631;
Faunterloy v. *Argonaut S. S. Line*, 27 Fed. (2d) 50;
Vanderlinden v. *Lorentzen*, 139 Fed. (2d) 995.

8. This decision absolves the shipowner from the necessity of making proper inquiry in respect to latent defects of ship's gear, and of the duty to provide gear fit for the purpose intended, which is contrary to the uniform prior holdings of this Court as expressed in the cases of:

Union Pacific Railway Company v. *O'Brien*, 161 U. S. 451;
Texas & P. R. R. Co. v. *Archibald*, 170 U. S. 665;
Gila Valley Ry. Co. v. *Hall*, 232 U. S. 94;
Choctaw, Oklahoma & Gulf R. R. Co. v. *McDade*, 191 U. S. 64;
Texas & P. R. R. Co. v. *Swearinger*, 196 U. S. 51.

Reasons for Allowance of the Writ

The Circuit Court of Appeals for the Second Circuit has decided a question of law of widespread importance to stevedores and shipowners in a way probably untenable and in conflict with all authority.

This decision bars a stevedore from maintaining an action in Admiralty predicated upon unseaworthiness and limits such stevedore exclusively to a civil action predicated upon negligence contrary to all decisions of this Court as uniformly held since the early case of *The Frank and Willie*, 45 Fed. Rep. 494, up to the recent case of *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, and is in conflict with the decision of the Second Circuit Court of Appeals in the case of *H. A. Scandrett*, 87 Fed. (2d) 708.

This decision is in conflict with and changes the prior uniform holdings of this Court that the ship and not the injured employee has the burden of proof on the question of seaworthiness where an accident results from defective ship's gear, and is contrary to the holdings in the cases of *The Osceola*, 189 U. S. 158, *The Frank and Willie*, 45 Fed. Rep. 494, *Mahnich* v. *Southern Steamship Co.*, 321 U. S. 96 and is likewise contrary to the decision of the Second Circuit Court of Appeals in the case of *H. A. Scandrett*, 87 Fed. (2d) 708, and is in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in the case of *Sieracki* v. *Seas Shipping Co., Inc.*, 1945 A. M. C. 407, 149 Fed. (2d) 98, decided April 11, 1945, two days after the decision of the case at bar by the Second Circuit Court of Appeals.

This decision decides that assumption of risk is a complete bar to an action predicated upon negligence and is contrary to the holdings in the cases of *Beadle* v. *Spencer*, 298 U. S. 124, *The Arizona* v. *Anelick*, 298 U. S. 110, *Smith* v. *Socony Vacuum Oil Co.*, 305 U. S. 425.

This decision decides that the contributory negligence of the third party exonerates a shipowner from liability for an accident caused by the breaking of its defective gear and is contrary to all prior law as enunciated in the case of *Vanderlinden* v. *Lorentzen*, 139 Fed. (2d) 995.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari issue to review the decision below.

Dated, August 7, 1945.

SANTO GRASSO,

By: JACOB RASSNER,
Counsel for Petitioner.

GEORGE J. ENGELMAN,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM 1945

No.

SANTO GRASSO,

Petitioner,

—against—

OIVIND LORENTZEN, Director of Shipping and Curator for the ROYAL NORWEGIAN GOVERNMENT, operating as a NORWEGIAN SHIPPING & TRADE MISSION,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Second Circuit in this case is to be found reported in 149 Fed. (2d) 127.

II

Statement of Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of Con-

gress of February 13, 1925 (U. S. C., Title 28, Section 347). The judgment to be reviewed was filed on May 16, 1945.

III

Statement of the Case.

The facts, rulings of the courts below and questions presented are set forth in the foregoing petition, pages 1-9 thereof.

IV

Assignment of Errors.

The Circuit Court of Appeals erred in sustaining the decision of the Trial Court, sitting in Admiralty, which had rendered a decree in favor of a shipowner on an erroneous statement of law; that stevedores assume the risk of injury from the breaking of defective gear, owned and rigged by the vessel.

The Circuit Court of Appeals committed further error in denying substantive rights of Admiralty law, to a stevedore in an Admiralty action, holding that the libelant was a "plaintiff" and required to prove civil liability of negligence in order to recover, on a maritime tort.

Summary of Argument

1. Both under the English law as well as the American law it has always been mandatory for a shipowner to keep and maintain his vessel in a seaworthy condition provided with sufficient, adequate and proper gear and equipment, failing which the vessel was held liable for injuries caused through such violation of a non-delegable duty.

2. A stevedore has always been considered as a seaman although not necessarily a member of the crew.

International Stevedoring Company v. *Haverty*, 272 U. S. 50 (1926);
Atlantic Transport Company of West Virginia v. *Imbrovek*, 234 U. S. 52 (1914).

3. When any person employed aboard a ship was injured through the breaking of part of the ship's gear, he was not required to prove unseaworthiness of the vessel, it was always the shipowner that was under the duty to affirmatively prove seaworthiness in order to escape liability for the breaking of the ship's gear.

4. It has never been the law that a shipowner was absolved from liability by reason of the contributory negligence of a third party.

5. A stevedore never assumed the risk of injury due to the breaking of the defective ship's gear and equipment.

6. The Trial Court having resolved all of the issues of fact in favor of the libelant, it was error to state, in substance, that the Trial Court resolved any factual issue or drew any inference in favor of the respondent.

7. The petitioner was denied justice when the Circuit Court of Appeals denied him the benefits of Admiralty law and designated him a "plaintiff" and held that he had to prove negligence, in addition to unseaworthiness, in order to recover.

8. The Circuit Court of Appeals inadvertently mis-stated the facts as shown by the evidence and as found by the Trial Court.

9. The decision is contrary to the uniform prior holdings of this Court and is in conflict with the recent decision by the Third Circuit Court of Appeals in the case of *Sieracki* v. *Seas Shipping Co., Inc., supra,* page 8.

POINT I

The rules as to liability for injury due to unseaworthiness of a vessel have been well settled.

Our Courts have uniformly held that when a person employed aboard a ship suffers injury through an unseaworthy condition or the breaking of defective ship's gear, that the vessel is liable.

The shipowner is presumed as a matter of law, to have made proper inquiry in respect to any latent defect and the petitioner was entitled to assume, that the strap was reasonably safe for the purpose intended. The strap having been used in the contemplated manner there being no apparent defect, the vessel is liable for the consequence of its breaking due to the hidden defect.

See:

Beadle v. *Spencer,* 298 U. S. 124;
Union Pacific Railway Company v. *O'Brien,* 161 U. S. 451;
Texas & P. R. R. Co. v. *Archibald,* 170 U. S. 665;
Gila Valley Ry. Co. v. *Hall,* 232 U. S. 94;
Choctaw, Oklahoma & Gulf R. R. Co. v. *McDade,* 191 U. S. 64;
Texas & P. R. R. Co. v. *Swearinger,* 196 U. S. 51;
Zinnel v. *U. S. Shipping Board* (C. C. A. N. Y.) 10 F. (2d) 47.

POINT II

A stevedore employed aboard a vessel never assumes the risk of injury due to defective gear.

The law is well settled that only risks normally incident to his calling are assumed by a person employed aboard a vessel and never the risk of defective gear breaking and causing injury.

In the case of *Faunterloy* v. *Argonaut S. S. Line*, 27 Fed. (2d) 50, the Court stated on page 51:

> "Neither libelant nor his employer, the stevedore, were charged with any duty in respect to this part of the ship's tackle. Each had a right to assume that it was free from any defects not observable in the exercise of ordinary care. Whatever duty there was to fasten the turnbuckle, so that it would not fall, was imposed on the vessel."

To the same effect see:

Liverani v. *Clark & Son*, 231 N. Y. 178;
Port of New York Stevedoring Corporation v. *Castagna*, 280 Fed. 618, cert. den. 258 U. S. 631;
The Chiswick, 231 Fed. 452;
Anglo-Patagonian, 235 Fed. 92.

POINT III

When ship's gear breaks and causes an accident, the shipowner has the burden of proving seaworthiness, failing which he is liable for damages to the injured person.

The petitioner was entitled to all the rights under Admiralty law and the Circuit Court of Appeals erred in treating him as a "plaintiff" in a civil action, requiring him to prove negligence, after he had proven that the accident was caused through the breaking of respondent's ship's gear and equipment.

The Circuit Court of Appeals inadvertently made many material mis-statements of fact.

a. The Circuit Court of Appeals stated in its opinion that "some" strands of the wire rope were defective. The fact is that the evidence showed and the Trial Court found that the wire rope was rusted through and through (ff. 189, 581).

b. The Circuit Court of Appeals found that the strap was bent over a "comparatively narrow gusset plate". From this one would naturally assume that the gusset plate in some way cut, frayed or damaged the strap or otherwise contributed to its breaking. The uncontradicted evidence however is that there was no sign of any cutting or fraying of the cable by the gusset plate or anything else (f. 364). It broke solely because it was rusted through and through (ff. 189, 364, 581).

c. The Circuit Court of Appeals found that the cable strap was "subject to heavy wear". The uncontradicted

testimony was that the strap was capable of withstanding a strain of 18 to 20 tons, if in good condition. It was used to withstand no more than 7 tons at a time. The phraseology of the opinion seemed to indicate that two days use of the strap in moving 15 or 16 crates had something to do with its breaking. There was no such testimony. The testimony was that if the strap were in good condition it would not only last during the moving of 15 or 16 crates weighing from 4 to 7 tons, but would last throughout the loading operation of the S.S. "Torvanger" moving crates weighing up to 18 to 20 tons and would *not* break (f. 159).

d. The Circuit Court of Appeals speaks of conflicting permissible inferences and the right of the Trial Court to make its own determination. Assuming that there were permissible inferences (although none of the facts as to the condition of the strap and the manner of the happening of the accident were controverted) the Trial Court having decided all the factual issues in favor of the libelant (ff. 581-582), said libelant was entitled to a decree in his favor on the very statement of the Circuit Court of Appeals.

e. Finally, in the last sentence, the Circuit Court of Appeals speaks "of the failure by the plaintiff" to prove that his injuries were caused by negligence, completely missing the point in the case and the question before said Circuit Court of Appeals, that the action was predicated upon the *unseaworthiness* of the vessel and that the *plaintiff did not have to prove negligence* and that the respondent had failed to prove the seaworthiness of the vessel, after it was proven that the accident was caused through the breaking of one of the ship's defective cable straps.

POINT IV

The Lower Court's interpretation of the law is in conflict with the uniform decisions of this Court.

The statement quoted by the Lower Court does not rule this case and the decision is inconsistent with the decision in the case of *The Frank and Willie*, 45 Fed. Rep. 494, where on page 496 the Court said:

> "In the case of the Kate Cann, 2 Fed. Rep. 241-245, the bark was held by Benedict J., liable to an injured stevedore, because the dunnage and plank where he was required to work in the ship's hold had not been properly secured, the dangerous situation being held a violation of a duty that the ship and her owners owed to the workmen. The same principle has been repeatedly applied in this Court in favor of stevedores or their employees on board. The Helios, 12 Fed. Rep. 732; The Max Morris, 24 Fed. Rep. 860; The Guillermo, 26 Fed. Rep. 921; The Nebo, 40 Fed. Rep. 31."

Where a vessel has committed a breach of duty she must show, not only, that her fault did not cause the accident but that her fault or neglect could not have caused the accident. See:

Belden v. *Chase*, 150 U. S. 674.

The decision of the Court below is also in conflict with the following cases:

The Osceola, 189 U. S. 158;
International Stevedoring Company v. *Haverty*, 272 U. S. 50 (1926);

Atlantic Transport Company of West Virginia v. *Imbrovek*, 234 U. S. 52 (1914);
Beadle v. *Spencer*, 298 U. S. 124;
The Arizona v. *Anelick*, 298 U. S. 110;
The H. A. Scandrett, 87 Fed. (2d) 708.

POINT V

The Lower Court's interpretation of the case at bar is in conflict with the decision that it handed down in the case of *The H. A. Scandrett*, 87 Fed. (2d) 708, and in conflict with the decision that it handed down in the case of *Gucciardi* v. *Chisholm, et al.*, 145 Fed. (2d) 514.

In the case at bar the lower Court held that in order to recover it was necessary for the petitioner, called "plaintiff" by the lower Court, to prove negligence but it did not hold that to be the law when it decided the case of *The H. A. Scandrett, supra*, but on the contrary stated as follows on page 710:

> "This is not an action under the Jones Act (41 Stat. 988) founded on negligence. The libelant is invoking a remedy based on unseaworthiness or defective condition of the vessel or her equipment. In such a case the liability for any injuries arising out of the neglect to supply a seaworthy vessel is not dependent on the exercise of reasonable care but is absolute. This, we think, follows from The Osceola, 189 U. S. 158, 175, 23 S. Ct. 483, 47 L. Ed. 760; Chelentis v. Luckenbach S. S. Co., 247 U. S. 372, 379, 381, 38 S. Ct. 501, 62 L. Ed. 1171; Carlisle Packing Co. v. Sandanger, 259 U. S. 255, 259, 42 S. Ct. 475, 476, 66 L. Ed. 927; Pacific S. S. Co. v. Peterson, 278 U. S. 130, 134, 49 S. Ct. 75, 76, 73

L. Ed. 220; The Arizona v. Anelich, 298 U. S. 110, 119-121, 56 S. Ct. 707, 709, 710, 80 L. Ed. 1075. See also, the Edwin I. Morrison, 153 U. S. 199, 14 S. Ct. 823, 38 L. Ed. 688; and Storgard v. France and Canada Steamship Corp. (C. C. A.) 263 F. 545, certiorari denied 252 U. S. 585, 40 S. Ct. 394, 64 L. Ed. 729."

In the *Gucciardi* case *supra*, the Court stated at page 516:

"It is well settled that when a shipowner or charterer in exclusive control and possession of a vessel furnishes gear for use by an independent contractor, he is under a duty to use care to furnish safe appliances, provided they are used in the contemplated manner. The Spokane (2 Cir.), 1924 A. M. C. 56, 294 Fed. 242, 245; Liverani v. John T. Clark & Son, 231 N. Y. 178, 131 N. E. 881; Peloso v. City of New York, 210 App. Div. 265, 205 N. Y. S. 606. While the independent contractor may himself be guilty of negligence if he permits the use of obviously defective gear, he may to some extent rely upon the duty of the shipowner to furnish initially safe appliances. Liverani case, supra, 231 N. Y. page 181, 131 N. E. 881; Luckenbach S. S. Co. v. Buzynski (5 Cir.), 1927 A. M. C. 1185, 19 F. (2d) 871, 873, reversed on another point, 277 U. S. 226, 1928 A. M. C. 921; Port of New York Stevedoring Corp. v. Castagna (2 Cir.) 280 Fed. 618, 620, certiorari denied 258 U. S. 631."

POINT VI

The Lower Court's interpretation of the law is in conflict with that of the Circuit Court of Appeals for the Third Circuit.

The Lower Court refused to extend to the petitioner any of the rights of a seaman injured aboard a vessel. This is in conflict with the decision in the case of *Sieracki* v. *Seas Shipping Co., Inc.*, 1945 A. M. C. 407, 149 Fed. (2d) 98.

The Third Circuit Court of Appeals stated on page 101:

> "This leaves us with the last and most difficult question in the case. Granted that no negligence on the part of the ship owner has been shown, is the owner, nevertheless, liable to this longshoreman because the defective shackle made the vessel unseaworthy? The District Court found as a fact that the accident occurred by reason of the unseaworthiness of the vessel. We think it is undisputed that if the falling boom had hit one of the sailors the injured seaman could have recovered from the ship's owner, or the ship, on the basis of breach of warranty of seaworthiness, that warranty not being dependent upon a showing of negligence at all. Mahnich v. Southern Steamship Co., 321 U. S. 96 (1944); The H. A. Scandrett, 87 F. (2d) 708 (C. C. A. 2, 1937). Is the longshoreman entitled to this same protection? It is clear that so far as the "warranty" depends upon contract, plaintiff was not a party to a contract with the ship owner. He was employed by the independent stevedore contractor. This does not necessarily settle the question. The term "warranty" used in this connection is a term used to describe a resulting legal liability, not to give a reason for it. The legal liability is not based upon fault, but is in the nature of insurers' liability, rooted in the admiralty law.

What, then, are the reasons for and against the application of the protection against injuries from unseaworthiness to one engaged in loading and stowing a ship's cargo? There is no question that in fact such service is necessary in the performance of the business of the ship. Formerly the work was done by the ship's crew, but owing to the demand for rapidity and special skill it has become a special service, one which has been called 'as clearly identical with maritime affairs as are the mariners'. And so an injury to a stevedore comes within the classification of a marine tort. Atlantic Transport Company of West Virginia v. Imbrovek, 234 U. S. 52 (1914). It seems, therefore, that when a man is performing a function essential to maritime service on board a ship the fortuitous circumstances of his employment by the ship owner or a stevedoring contractor should not determine the measure of his rights. This is the very basis on which the Jones Act was held applicable to give redress to an injured stevedore in International Stevedoring Company v. Haverty, 272 U. S. 50 (1926), commented upon in 27 Col. L. Rev. 211. See also Uravic, Administratrix v. F. Jarka Company, Incorporated, et al., 282 U. S. 234 (1931).

* * * * *

It seems to us that the weight of the argument favors an extension of the protection to the stevedore's employee during the period when he is actually engaged upon a ship in the loading or unloading thereof. He is working in marine employment and is subject to all its risks for the time being. The fact that the exigencies of modern commerce have called in additional help for loading and unloading does not make the undertaking any less a marine transaction and rightly subject to the rules of law for the protection of workers who

take the risks of such transactions. We do not hold that a stevedore is entitled to everything that a seaman may claim. All we are deciding now is that if he is injured on the ship in the course of unloading or loading the vessel he may have redress for a defect caused by its unseaworthiness.

We have found no decision which gives consideration and discussion to the point now before us. There are statements and assumptions each way. In W. J. McCahan Sugar Refining & Molasses Co. v. Stoffel, 41 F. (2d) 651 (C. C. A. 3, 1930) Judge Wooley says, page 654, 'The law regards a longshoreman or stevedore, injured while engaged in maritime service aboard a ship lying in navigable waters, as a seaman with all his peculiar rights and immunities.' In Cassil v. United States Emergency Fleet Corporation, et al., 289 Fed. 774 (C. C. A. 9, 1923) the court says that a stevedore, injured while loading a ship could hold the owner of the vessel 'only on the theory that the vessel was unseaworthy in respect to the instrument whereby his injuries were occasioned'. On the other hand, there are a number of decisions in which it is either assumed, or stated, without discussion or elaboration, that the duty owed by the ship owner to the employee of the stevedore is only that of reasonable care.

In other words, the responsibility is the same as that of any occupier of premises toward a business guest. Panama Mail Steamship Co. v. Davis, 79 F. (2d) 430 (C. C. A. 3, 1935) (in this case the standard of reasonable care as a measure of duty was agreed upon by both sides); Bryant v. Vestland, 52 F. (2d) 1078 (C. C. A. 5, 1931); Luckenbach S. S. Co., Inc., et al. v. Buzynski, 19 F. (2d) 871 (C. C. A. 5, 1927), rev'd on another ground 277 U. S. 226 (1928); The Howell, 273 Fed. 513

(C. C. A. 2, 1921); The Student, 243 Fed. 807 (C. C. A. 4, 1917), cert. den. 245 U. S. 658 (1917); Jeffries, et al. v. DeHart, 102 Fed. 765 (C. C. A. 3, 1900); The Mercier, 5 F. Supp. 511 (D. C. Ore. 1933), aff'd 72 F. (2d) 1008 (C. C. A. 9, 1934).

It will be observed that the numerical weight of decision in the lower federal courts seems against the view here expressed, although, as stated above, the point has been assumed rather than concluded as a result of the examination of principle and precedent. The logical trend of the Supreme Court authority is, we think, in favor of extending to the stevedore the rights of a seaman when engaged in marine employment. On principle we think he should have these rights, at least, to the extent called for by the facts of this case and we so decide."

CONCLUSION

For the reasons stated, and on the authority of the cases cited, it is respectfully submitted that the petition should be granted.

Respectfully submitted,

JACOB RASSNER,
Counsel for Petitioner.

GEORGE J. ENGELMAN,
Of Counsel.

RECORD PRESS—NYC—REctor 2-2638

IN THE

Supreme Court of the United States

October Term 1945

No. 340

SANTO GRASSO,

Petitioner,

against

OIVIND LORENTZEN, Director of Shipping and Curator for the ROYAL NORWEGIAN GOVERNMENT, operating as a NORWEGIAN SHIPPING & TRADE MISSION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDGAR R. KRAETZER,
Counsel for Respondent.

IN THE

Supreme Court of the United States

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No. 340

SANTO GRASSO,

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State of the Case and Theory of the Action as Presented Below

Petitioner bases his argument on the suggestion that the courts below deprived him of relief that he now states was predicated upon a claim of unseaworthiness.

In his pleadings, petitioner's action is predicated upon a failure to provide proper tools, appliances, etc., and hence is predicated upon negligence. See Article Fourteenth of the libel (ff. 8-10). The only suggestion of a claim of unseaworthiness is in the 13th Answer to Interrogatories (f. 38), referring to a part of the equipment, *i. e.*, a snatch block which, under the proof on the trial, was not involved in the accident. Any references to rules of proof

in admiralty with regard to questions of seaworthiness are therefore irrelevant. The case was neither presented before the Trial Judge nor to the Appellate Court on any theory of unseaworthiness.

Petitioner's repeated references to the Appellate Court's single inadvertent use of the word "plaintiff" is reprehensible in the extreme.

Supplementary Statement of Facts

Proof at the trial established that the strap in question was adequate when the stevedores began to use it, that it was bent sharply back over the 5/8-inch cutting edge of a structural plate (ff. 152-153), that it was particularly susceptible to being severed (ff. 153-154), that it was an imperative and established custom for the longshoremen to make periodic inspections during the use of such a strap (f. 155), that no prior or intermediate inspection was made by the longshoremen (ff. 208, 212-213), that the strap survived its use for two days (ff. 206, 211, 239) to shift some 15 or 16 crates weighing from 4 to 7 tons (f. 291), and that when examined after the accident it appeared as though "cut" (ff. 256, 283).

The Findings and Ruling of the Courts Below

On conflicting proof the courts below properly found that the accident occurred, not through the negligence of the shipowner, but because of the negligence of libelant's employer in failing to make the frequent, customary inspections entailed by the nature of the equipment, its use and its inherent susceptibility to failure. There was no finding that the libelant assumed the risk.

The Decisions Below Were Correct

Both the Trial Court and the Appellate Court decided the question of fact in favor of the respondent, the Trial Court finding that the accident occurred through failure of the longshoremen to make the customary and necessary inspections of the apparatus employed, the Appellate Court in addition pointing out that because of the undisputed history of prior use of the apparatus libelant had failed to prove that the strap was initially unsafe and unfit for use.

No such questions of law as are now proposed by petitioner were involved in the proper determination of this cause, and the petition should be denied.

Respectfully submitted,

EDGAR R. KRAETZER,
Counsel for Respondent.

LAWYERS PRESS, INC., 165 William St., N. Y. C.; 'Phone: BEckman 3-2300

IN THE

Supreme Court of the United States

October Term, 1945.

No. 340.

SANTO GRASSO,

Petitioner,

AGAINST

OIVIND LORENTZEN, Director of Shipping and Curator for the ROYAL NORWEGIAN GOVERNMENT, operating as a NORWEGIAN SHIPPING & TRADE MISSION,

Respondent.

Motion for Leave to File Petition for Reargument Out of Time and Petition for Rehearing of Santo Grasso's Petition for a Writ of Certiorari.

JACOB RASSNER,
Proctor for Petitioner.

GEORGE J. ENGLEMAN,
Of Counsel.

LODER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689

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IN THE

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Notice of Motion.

SIRS:

PLEASE TAKE NOTICE that upon all the pleadings and proceedings heretofore had herein and upon the annexed affidavit of Jacob Rassner, duly verified the 23rd day of April, 1946, a motion will be made before the Supreme Court of the United States at Washington, D. C., on the 13th day of May, 1946, at a Term held for motions at the opening of the Court, or as soon thereafter as counsel can be heard, for an order granting leave to file petition for re-argument out of time of petition for re-hearing of Santo Grasso's petition for a writ of certiorari, and for

such other and further relief as to this Court may seem just and proper.

Dated, New York, April 23rd, 1946.

Yours, etc.,

JACOB RASSNER,
Proctor for Petitioner,
Office & P. O. Address,
220 Broadway,
Borough of Manhattan,
City of New York.

GEORGE J. ENGLEMAN,
Of Counsel.

To:

HAIGHT, GRIFFIN, DEMING & GARDNER, ESQS.,
Proctors for Respondent,
80 Broad Street,
New York, N. Y.

Affidavit of Jacob Rassner.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM 1945.

SANTO GRASSO, *Petitioner,* AGAINST OIVIND LORENTZEN, Director of Shipping and Curator for the ROYAL NORWEGIAN GOVERNMENT, operating as a NORWEGIAN SHIPPING & TRADE MISSION, *Respondent.*	No. 340.

STATE OF NEW YORK, }
COUNTY OF NEW YORK. } ss.:

JACOB RASSNER, being duly sworn, deposes and says:

That he is counsel for Santo Grasso, the petitioner herein.

Petitioner was injured on the 15th day of May, 1942 as a result of the breaking of a ship's steel cargo strap.

The cargo strap broke, according to all of the uncontradicted evidence in the case, as a result of it being completely rusted through and through.

Affidavit of Jacob Rassner.

The action was tried in Admiralty before Judge Henry W. Goddard on the 8th, 9th, 10th days of February, 1944.

The Trial Court found that the vessel owner was not liable, as the stevedores had failed to inspect the strap from time to time as the work was progressing.

The Trial Court found on the uncontradicted testimony of several eye witnesses, who testified that the cable strap was rusted through and through, at a portion which was concealed from view behind a beam, that several of the strands of the cable were rusted.

On this evidence and the Trial Court's finding, *the ship's cable strap was defective and unseaworthy.*

On the 9th day of April, 1945, the Court of Appeals for the Second Circuit affirmed the judgment of the Court below, holding that the ship was under no duty to inspect its cargo strap after the stevedores commenced working with it.

On the 8th day of October, 1945, this Court denied the petitioner's petition for a writ of certiorari.

On the 22nd day of April, 1946, this Court handed down a decision in the case of *Seas Shipping Company, Inc., Petitioner,* v. *Joseph Sieracki* holding that a shipowner owes the same duty to a stevedore to provide gear and equipment free from defects, as it does to a member of the crew.

In view of the *Seas Shipping Company, Inc.,* v. *Sieracki* decision, Grasso is entitled to recover.

Solely on the authority of the *Sieracki decision, supra,* is petitioner moving for a re-argument of his petition for a writ of certiorari, consequently he could not have made this motion at an earlier date, as the decision in the *Sieracki case, supra,* just came down on the 22nd day of April, 1946.

Affidavit of Jacob Rassner.

WHEREFORE, deponent respectfully asks that petitioner be granted leave to file his petition out of time, for a rehearing of his petition for a writ of certiorari, denied on the 8th day of October 1945, and for such other and further relief as to this Court may seem just and proper.

JACOB RASSNER.

Sworn to before me this
23rd day of April, 1946.

ANN BERNARD,
Notary Public,
Kings County,
Kings Co. Clk's No. 819 Reg. No. 669-B-7;
N. Y. Co. Clk's No. 1437 Reg. No. 1125-B-7;
Commission expires March 30, 1947.

IN THE

Supreme Court of the United States

OCTOBER TERM 1945.

SANTO GRASSO, *Petitioner,* AGAINST OIVIND LORENTZEN, Director of Shipping and Curator for the ROYAL NORWEGIAN GOVERNMENT, operating as a NORWEGIAN SHIPPING & TRADE MISSION, *Respondent.*	No. 340.

Petition for Rehearing of Petition for a Writ of Certiorari.

On the 8th day of October 1945, this Court denied the petition of Santo Grasso for a writ of certiorari to this Court to review the decision of the Circuit Court of Appeals for the Second Circuit, which on the 9th day of April 1945, affirmed the decision of Judge Henry W. Goddard dismissing petitioner's cause of action in Admiralty against the respondent herein.

The action was predicated upon an accident which occurred on the 15th day of May 1942, when the ship's cargo strap broke as a result of it being rusted through and through.

The action was tried in Admiralty before Judge Goddard on the 8th, 9th, 10th days of February, 1944.

The Trial Court found that the vessel owner was not liable, as the stevedores had failed to inspect the strap from time to time as the work was progressing.

The Trial Court did find that several strands of the cable strap were rusted.*

On the 9th day of April 1945 the Court of Appeals for the Second Circuit affirmed the judgment of the Court below, holding that the ship was under no duty to inspect its cargo strap after the stevedores commenced working with it.

On the 8th day of October 1945 this Court denied the petition's petition for a writ of certiorari.

On the 22nd day of April, 1946, this Court handed down a decision in the case of *Seas Shipping Company, Inc., Petitioner,* v. *Joseph Sieracki* holding that a shipowner owes the same duty to a stevedore to provide gear and equipment free from defects, as it does to a member of the crew.

In view of the *Seas Shipping Company, Inc.* v. *Sieracki,* decision, Grasso is entitled to recover.

The lower Court took the view that the rusty cable might have been cut by a gusset plate which had been affixed to the beam (there was no evidence that this actually happened) and held that the cause of the accident was the failure of Grasso's fellow employees to inspect the cable from time to time as the work was progressing, regardless of the fact that to all appearances the cable seemed to be in good condition.

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*The Trial Court found that several strands of the cable were rusted through. On casual reading, this might indicate that the cable was not rusted through and through, however, the uncontradicted testimony is that the cable consisted of several strands, all of which were rusted through and through, about six inches each way from the break. The rusted part was the section of the strap which was concealed from view by reason of the fact that it was wedged behind an upright beam in the hold of the vessel and could not be seen on casual observation until after it broke and came away from behind the beam. These facts were not contradicted at the trial.

The facts in the case at bar present the exact identical question raised in the case of *Seas Shipping Company, Inc.* v. *Sieracki, supra,* decided by this Court on the 22nd day of April, 1946.

In the *Seas Shipping Company, Inc.* v. *Sieracki,* case, *supra,* a ship's ringbolt broke by reason of a hidden defect.

In the case at bar, a ship's cable strap broke, by reason of a defective condition, which was hidden behind a beam, which concealed the rusty part from view.

The argument in the case at bar that the cable strap *might* have been broken through usage applies with equal force to the argument that the ringbolt in the *Seas Shipping Company, Inc.* v. *Sieracki* case, *supra,* might have been broken in the same manner.

In neither the *Seas Shipping Company, Inc.* v. *Sieracki* case, *supra,* nor the case at bar was there any evidence that the work put any unusual strain on the appliance in question, or that it was broken by the stevedores failing to inspect the appliance.

In the *Seas Shipping Company, Inc.* v. *Sieracki* case, *supra,* no duty of inspection was placed upon the injured stevedore's fellow employees.

Accordingly, no such duty should have been imposed on petitioner's fellow employees.

In the *Seas Shipping Company, Inc.* v. *Sieracki* case, *supra,* this Court imposes the obligation on the vessel owner to maintain gear in a reasonably safe condition.

In the case at bar, there is no denial that the shipowner failed to maintain the cable strap in question in a reasonably safe condition, irrespective of the fact that it was in a rusty defective condition at the commencement of the work.

The *Seas Shipping Company, Inc.* v. *Sieracki* case, gives to a longshoreman the same protection against defective and unseaworthy appliances as has always been accorded by law to a member of a crew.

The question presented in the petition for a writ of certiorari by Santo Grasso was the same as the question raised by Seas Shipping Company, Inc.

Having granted the writ of certiorari to the Seas Shipping Company, Inc., it seems that Santo Grasso is entitled to the same relief.

Having held that Joseph Sieracki was entitled to a recovery by reason of a ship's ringbolt breaking due to a hidden defect, when it might have broken through other causes as well, there seems no reason why a recovery should be denied Santo Grasso, when the ship's rusty cable strap broke and gave way during ordinary usage.

Therefore your petitioner asks that the merits of its petition for certiorari be given consideration.

SANTO GRASSO,
Petitioner.

JACOB RASSNER,
Proctor for Petitioner.

GEORGE J. ENGLEMAN,
Of Counsel.

Dated, New York, April 23, 1946.

I hereby certify that I have examined the foregoing petition and in my opinion it is well founded and entitled to the favorable consideration of the court and that it is not filed for the purpose of delay.

JACOB RASSNER.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 340

SANTO GRASSO,

Petitioner,

against

OIVIND LORENTZEN, Director of Shipping and Curator for the ROYAL NORWEGIAN GOVERNMENT, operating as a NORWEGIAN SHIPPING & TRADE MISSION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR REARGUMENT

EDGAR R. KRAETZER,
Counsel for Respondent.

TABLE OF CASES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

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RESPONDENT'S BRIEF

Petitioner's application for leave to reargue the petition for a writ of certiorari which was denied by this Court on the 8th day of October, 1945, is stated to be based solely upon the recent decision of this Court in *Seas Shipping Co., Inc.*, v. *Sieracki*, decided April 22, 1946.

Factually the apparatus involved in the *Sieracki* case was a practically inaccessible shackle near the top of the ship's mast, whereas in the *Grasso* case the equipment consisted of an easily accessible strap, which was customarily subjected to examination by the operating stevedores. This distinction is obvious from the following quotations from the decisions by the respective Circuit Courts of Appeal:

Sieracki v. *Seas Shipping Co.*, 149 F. (2d) 98, 99:

> "• • • • After rigging the gear on the ten-ton boom, which had never been used up to this time, the longshoremen lowered one piece of freight into the hold of the ship and were engaged in stowing

away the second part of the freight car, the weight of which was not in excess of 8.2 tons, when the shackle which supported the ten-ton boom broke, causing the boom and tackle to come down and injure the plaintiff.' "

Grasso v. *Lorentzen*, 149 F. (2d) 127, 129:

"The following findings of fact made by the trial court are based on substantial evidence:

'11. Straps used as was the one in question are quite likely to break, and it was the established custom to examine them from time to time while they were in use.

'12. It was the established custom and practice of Northern Dock Company to examine and inspect a strap before assigning it for use.

'13. No adequate inspection of the strap that broke was made before the longshoremen put it into use, and no adequate examination was made by them while it was in use.

'14. The accident occurred because the longshoremen put into use and continued in use, without adequate inspection, the strap that broke.'

It was shown that these straps were subject to heavy wear and that they often broke in use. This particular strap was bent over the edge of the comparatively narrow gusset plate, and during two days before it broke had been withstanding strains put upon it while it was used in moving into position fifteen or sixteen crates each weighing from four to seven tons. * * * "

The petition should be denied.

Respectfully submitted,

EDGAR R. KRAETZER,
Counsel for Respondent.